

TO: The Utah Constitutional Revision Commission

FROM: The Utah Attorney General's Office

DATE: June 9, 2009

RE: Responses to the CRC's May 28, 2009, request for information.

(1): Purpose for a Constitutional Amendment

The Utah State Legislature has enacted major legislation to address the post conviction appeals process (the Post Conviction Relief Act - PCRA). The purpose of the act is to reduce the time and causes of action that can be raised in post conviction actions. There have been subsequent modifications to the act. Comments made during legislative debate on S.J.R. 14 stated that a primary motivation was that Utah Courts were not following the provisions of the PCRA and therefore a constitutional amendment is needed to ensure that the law would be followed. Please comment on the following:

The CRC states that Post-Conviction Remedies Act's purpose "is to reduce the time and causes of action that can be raised in post conviction actions." The Attorney General disagrees. First, the PCRA does not "reduce" the causes of action permitted in post-conviction review. Rather, the PCRA and common law post-conviction review permit relief on materially the same bases.

Second, the PCRA's purpose is not to "reduce the time" involved in post-conviction review. Rather, the PCRA was designed to balance the interest in providing convicted persons with a generous opportunity to seek relief for serious constitutional errors in their convictions or sentences against the interest in providing the citizens of this state and, more importantly, crime victims the finality and closure to which they are entitled. As the primary means of achieving that balance, the PCRA 1) cuts off only those claims that a convicted person does not pursue with reasonable diligence; and 2) creates time and procedural bars to which the federal courts will defer under controlling federal procedural default law.

As to the first, the PCRA requires convicted persons to bring their claims at the earliest possible opportunity. Its time and procedural bar exceptions do not apply until the convicted person has available the law and facts to pursue the claim. Even then, the time-bar gives the convicted person a year to file his petition and excuses delay when it is not the convicted person's fault. After that, however, the PCRA cuts off all claims.

As to the second, the statutory time and procedural bars will prevent litigants from returning from federal court to state court to raise claims that they should have raised in their first state post-conviction actions. As explained in response to request 3, the federal courts would dismiss those claims as procedurally defaulted without reaching their merits or returning them to state court for merits determination.

(1)1: What are the specific actions or results that are sought by an S.J.R. 14-type amendment?

The proposed amendment's purpose is to make the PCRA the law governing post-conviction review in order to implement the PCRA's original purpose of striking a fair balance between the legitimate interests of convicted persons on the one hand, and the interests of society and victims on the other. To that end:

- The proposed amendment would guarantee that innocent prisoners can never be deprived of an avenue to challenge their convictions.
- The proposed amendment would overrule case law that the judiciary has plenary constitutional authority over post-conviction review of criminal convictions and sentences. The Utah Supreme Court has applied that case law to rely on its common law rules in contravention of the PCRA. *See, e.g., Tillman v. State*, 2005 UT 56, 128 P.3d 1123.
- The amendment would bar stale, defaulted, or successive post-conviction claims brought by non-innocent prisoners. The PCRA forecloses such claims. Present and, potentially, future common law rules may not. In death-penalty cases, non-innocent, non-diligent prisoners could not forestall their executions through a potentially endless string post-conviction petitions raising claims that they could have, but did not raise in an earlier petition.
- The amendment would make the PCRA's procedural- and time-bar rules the controlling law, which, in turn, will narrow federal review under controlling federal procedural default law. See response to request 3.
- The amendment would restrict the creation of new rights that may create unnecessary delay. For example, a court-created right to the effective assistance of post-conviction counsel may permit an endless string of post-conviction petitions where each successor post-conviction counsel claims that the courts must review a

successive petition because prior post-conviction counsel was ineffective.¹

- The amendment would reduce the emotional harm currently inflicted upon victims as a result of repetitive, and in death cases interminable, post-conviction litigation.

(1)2: Is there evidence that the current Post Conviction Relief Act (PCRA) is not being followed by the Utah Courts? If so please provide specific examples.

In *Gardner v. Galetka*, the supreme court reasoned that “the power to review post-conviction petitions ‘[q]uintessentially ... belongs to the judicial branch of government’ As such, ‘the legislature may not impose restrictions which limit [post-conviction relief] as a judicial rule of procedure, except as provided in the constitution.’” *Gardner*, 2004 UT 42 ¶ 17. In *Gardner*, the supreme court relied on this analysis to hold that its common law procedural bar exceptions remained viable as a matter of state constitutional law, and that, to the extent that the PCRA purported to supplant them, the PCRA “suffer[ed] from constitutional infirmities.” *Id.* at ¶¶ 14-17. The court concluded that the PCRA procedurally barred Gardner’s claim, and that the common law procedural bar exceptions did not excuse the bar because the claim was not facially plausible. *Id.* at ¶¶ 16, 19.

In *Tillman v. State*, the supreme court relied on the *Gardner* court’s reasoning to apply a procedural bar exception that the PCRA does not recognize. *Tillman*, ¶¶ 22-25.

In *Ford v. State*, 2008 UT 66, 199 P.3d 892, and *Medel v. State*, 2008 UT 32, 184 P.3d 1226, the supreme court bypassed the PCRA’s procedural bar rules to reach the merits of Ford’s and Medel’s claims.

District courts are applying the analysis imposed by *Tillman* and *Gardner*. That is, they are assessing whether merits review is permitted under either the PCRA’s or the common law’s procedural bar exceptions. For example, in the recent district court ruling in *Carter v. State*, case no. 060400204 (Fourth District Court), the district judge looked passed the PCRA’s procedural bar exceptions to assess whether any common law exception entitled Carter to merits review to his successive petition claims. Carter’s claims could have been summarily dealt with under the PCRA because he admitted that he could have, but did not raise them in his first post-conviction petition.

In *Archuleta v. Galetka*, 2008 UT 76, 197 P.3d 650, the supreme court has positioned itself

¹There is no federal constitutional right to post-conviction counsel, much less the effective assistance of post-conviction counsel.

to overrule the Legislature's 2008 amendment to the PCRA. The statutory amendment deals with the situation where all qualified counsel refuse appointment to represent a death-sentenced post-conviction petitioner. Under the amendment, if no counsel will take the case, then the petitioner must elect either to proceed *pro se* or dismiss his petition. Utah Code Ann. 78B-9-202(5) (2008). Although that was not the situation in *Archuleta*, the supreme court held that the Legislature had the "duty" to provide "sufficient resources to attract . . . counsel," and threatened that,

[i]f, in the future, we find that the unavailability of competent and *willing* counsel impedes prompt, constitutionally sound resolution in capital cases, we may be forced to hold that the lack of such counsel is sufficient grounds for outright reversal of a capital sentence and remand for the imposition of a sentence of life in prison without the possibility of parole

Id. at ¶¶ 19-20 (emphasis added). This gives the post-conviction plaintiff's bar the power to circumvent the amendment to 202 and either 1) work a *de facto* repeal of the death penalty merely by refusing to accept appointment; or 2) hold death-penalty post-conviction cases hostage until the Legislature pays whatever sum will make the lawyers "willing" to accept the appointment.

(1)3: If there are needed changes in post conviction activities can they be accomplished with statutory changes or other means as opposed to a constitutional amendment? Why is a constitutional amendment the preferable or necessary remedy for these concerns?

A constitutional amendment is not "preferable" to a statutory remedy. However, no statutory remedy is possible. As discussed, the supreme court has held that it has constitutional authority over post-conviction review that the Legislature may not restrict. Amending the PCRA can have no effect on the court's constitutional authority over such claims.

The Attorney General has formed a study group to review the proposed amendment. At the request of those who oppose a constitutional amendment, that group is exploring the possibility of using a rule amendment to achieve substantially the same end as the proposed constitutional amendment. It is not clear whether that effort will produce an alternative that is acceptable or even feasible.

(2): Relationship Between S.J.R. 14 and Other Constitutional Provisions

S.J.R. 14 proposed an amendment to Article VIII of the Utah Constitution (Judicial Article). Comments made during the 2009 legislative debate stated that S.J.R. 14

would have no impact on the provisions of Article I, Section 5 - Habeas Corpus. That provision indicates Habeas Corpus may not be suspended except in very limited circumstances. The language of S.J.R. 14 states, however, that the proposed amendment would supersede any other conflicting provisions.

(2) 1: If the stated purpose of S.J.R. 14 is to completely restrict the authority of the courts in post conviction matters, can that objective be accomplished without restricting Article I, Section 5 - Habeas Corpus?

(2) 2: If the language of S.J.R. 14 were utilized and the current language of Article 1, Section 5 retained, what would be the likely impact of these two possible competing constitutional provisions?

(2)1 & 2:

SJR14 did not propose to amend Article VIII of the Utah Constitution, as the CRC states. It proposed to amend Article I, Declaration of Rights.

In any event, the amendment would have no effect on article I, section 5, Habeas Corpus. The habeas corpus writ protected by article I, section 5 is not the authority to vacate convictions entered by courts of competent jurisdiction and affirmed on appeal, but the authority to terminate illegal pretrial detentions.

At common law, the writ of habeas corpus was restricted to challenging imprisonment without judicial authorization. 6 Wayne R. LaFave, *Criminal Procedure*, § 28.1(a), at 6-7 (2nd ed. West 2004). The state constitutional convention debates show that this is how the Utah Constitution's framers understood the writ. In discussing Art. I, § 5's proscription on suspending the writ of habeas corpus, the framers characterized it as an issue of "depriving [a person] of his liberty without [the writ's] particular redress" State of Utah Constitutional Convention at 253. The framers continued that the writ should be suspended "if the emergency is grave enough," to give "those in authority the use of their best judgment" and "not to be forced to give any reason for their acts." *Id.* at 256.

The language demonstrates the framers understood that, in times of emergency, the government should have the authority to incarcerate someone without giving any reason and, as a corollary, to remove the means to challenge that incarceration. The need to incarcerate someone without any reason has nothing to do with post-conviction review of a criminal conviction. In that circumstance, there exists the most compelling reason to incarcerate a person: the person has been found guilty of a crime.

The proposed amendment would have no effect on remedies for illegal pre-trial detentions. Therefore, it does not work a suspension of the writ of habeas corpus as the framers understood that concept.

(3): Relationship with the Federal Courts

Some concerns have been expressed that near absolute restrictions on judicial review of all post conviction relief will actually increase pressure on the federal courts to become the primary forum for judicial examination of post conviction appeals. Please comment on the legal and administrative ramifications associated with a shift of many of these cases to the federal court system.

Under the PCRA as presently written, the proposed constitutional amendment will not shift post-conviction review from state to federal court. On the contrary, it will significantly limit intrusive federal review of state convictions.

Federal courts will address claims on their merits only if state courts have—or could—address such claims on their merits. If a federal petitioner raises claims for the first time in federal court, and the state procedural bar rules would bar merits review if he attempted to raise the claims in state court, the federal courts also will refuse to reach the merits of those claims.

The Legislature wrote the PCRA to give Utah the advantage of these federal default rules. That is, it created non-merits based procedural bar rules. If controlling, the PCRA's rules would bar federal review of claims not timely raised in state court. The federal courts would dismiss those claims as procedurally defaulted without addressing their merits.

However, by holding that the merits-based, common law rules are constitutionally mandated, the Utah Supreme Court has circumvented the PCRA's purpose. It has held that constitutional exceptions exist that allow the court to weigh the merits of a claim before determining whether it is “procedurally” barred. Because our court reserves the right to reach the merits of all post-conviction claims, the federal court must either return the claims to State court for merits review or review the claims' merits. Under the latter option, there will be no state ruling to which the federal court must defer, which, in turn, exposes the state judgment to a greater risk of federal reversal.

Thus, under *Tillman* and *Gardner*, Utah convictions and sentences require a second round of state post-conviction review in every case in order to avoid the higher risk of federal reversal under non-deferential federal review. Under the proposed constitutional amendment, Utah courts would be required to enforce the PCRA's procedural bar rules.

They would thus reject stale, defaulted, and repetitive claims as procedurally barred without weighing their merits. The federal courts would likewise reject these claims without requiring the parties to litigate their merits.

The proposed constitutional amendment would reduce federal review of state convictions significantly.

(4): The Relationship Between the Judiciary and the Legislature

After several years of study the Constitutional Revision Commission recommended a comprehensive review of Article VIII - the Judicial Article to the Utah Legislature in 1984. The Legislature approved the proposal and submitted it to the public, which approved the measure overwhelmingly at the 1984 election. The new judicial article included language specifically recognizing traditional common law extraordinary writs - some of which had existed in the Utah State Constitution since statehood. The CRC study also viewed the inclusion of these provisions as a longstanding traditional safeguard against rare possibility of miscarriages of justice and as a formal acknowledgment of the role of the judiciary in the separation of powers.

The language of S.J.R. 14 would eliminate this recognized constitutional authority as it relates to post conviction appeals. Please comment on the impact of this change as it relates to the historic role of the judiciary and the 1984 rewrite of the Judicial Article that was adopted by Utah voters.

This request assumes that the “extraordinary writ” language in amended Article VIII includes all of the common law writs previously listed in Article VIII. That is not apparent on the face of the amended article. Further, the framers did not understand the common law writ of habeas corpus to include post-conviction review. See answer to request (2).

The Attorney General acknowledges that the supreme court has held that the “extraordinary writ” language in amended Article VIII includes post-conviction review. *Hurst v. Cook*, 777 P.2d 1029, 1033 (Utah 1989). The proposed amendment would overrule *Hurst*. However, it would leave unaffected all writ authority before the direct appeal or time to seek such an appeal ends, such as pre-trial detentions, extradition challenges, and extraordinary relief actions.

Finally, the entire request appears to assume that the judiciary traditionally has the authority to define the scope and availability of post-conviction review, and that the proposed amendment upsets that role by giving it to the Legislature. Viewed on a national scale, that assumption is incorrect. In fact, the Utah Supreme Court’s assumption that it has sole

authority to define post-conviction review is the distinct minority position.

Under *Gardner* and *Tillman*, only the judiciary may define the scope of post-conviction review. The Attorney General's research revealed only one other state court, Florida, that clearly has taken the same absolutist view that the Utah court has taken. By contrast, the United States Supreme Court, in assessing Congressional restrictions on federal habeas corpus review, recognized that "judgments about the proper scope of the writ are 'normally for Congress to make.'" *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (citation omitted).

In the first case decided after the Legislature passed the PCRA, the supreme court appeared to follow the model of *Felker* and other states. In *Julian v. State*, 52 P.3d 1168 (2002), the court noted that "[t]he PCRA replaced prior post-conviction remedies with a statutory, 'substantive legal remedy for any person who challenges . . .'" *Id.* at 1169. Then, in *Gardner*, and without acknowledging *Julian*, the Court held that the prior post-conviction remedies were constitutionally based and could not be restricted by Legislative action.

The proposed amendment does not upset the balance of power. It gives back to the Legislature its traditional policy-making role by allowing the Legislature to decide when and under what conditions a convicted non-innocent person may challenge his conviction or sentence beyond the direct appeal guaranteed by Art. I, § 12.

Even if the proposed amendment narrowed the reach of Article VIII's extraordinary writ language, the result is appropriate in the present litigation environment. When the current judicial article was drafted in 1984, Utah courts were not burdened by the current avalanche of stale, defaulted, successive, and often frivolous post-conviction claims. The drafters of that article did not, and had no reason to, anticipate today's breakdown of the state post-conviction system. The proposed amendment addresses this new problem.

Utah's justice system is seriously broken. It is broken in a way that works a gross injustice on the victims of violent crime. Ignoring the breakdown or clinging to the status quo will not solve the problem.

The Attorney General has proposed a workable solution in the form of a constitutional amendment. We welcome constructive input from all interested parties. In particular, we invite thoughtful comments identifying harmful, unintended consequences likely to flow from the current language of the amendment and wording changes that would avoid such consequences.

(5): The Death Penalty/Other Criminal Appeals

The entire focus of the S.J.R. 14 legislative discussion was on death penalty cases. Yet, the application of the provisions of the proposed amendment would impact all aspects of post conviction jurisprudence. Please comment on the possible impact of S.J.R. 14 on non-death penalty cases as well as existing criminal rules such as Rule 22, Utah Rules of Criminal Procedure. In addition, there have been some suggestions that a S.J.R. 14 - like provision may impose greater pre-conviction constitutional requirements on the criminal justice system. Please comment.

The CRC misstates that the “entire focus of the S.J.R. 14 legislative discussion was on death penalty cases.” True, death-penalty cases are the primary problem that SJR14 will address. However, they are not the only problem. The same rules applied under the *Tillman/Gardner* rationale apply in non-death cases and will frustrate the legitimate interest in finality and closure by permitting piecemeal, delayed, and repetitive post-conviction litigation. As detailed above, the supreme court circumvented the PCRA in *Ford* and *Medel*, neither of which are death cases.

Moreover, SJR14’s senate sponsor, Senator Curtis Bramble, recognized that imposing greater restrictions on state post-conviction review in death cases than in non-death cases may invalidate the state constitutional amendment under the Fourteenth Amendment Equal Protection Clause.

The CRC asks for comment on how SJR14 will affect pre-existing rules of criminal procedure such as rule 22. Most of the criminal procedural rules will be unaffected because they do not affect procedures after the direct appeal. However, Utah R. Crim. P. 22(e) can no longer apply after the direct appeal, and a court’s authority to correct an “illegal sentence” or “sentence imposed in an illegal manner” will be governed by the PCRA.

Finally, the CRC asks for comment on “some suggestions that a S.J.R. 14 - like provision may impose greater pre-conviction constitutional requirements on the criminal justice system.” Without knowing what the “suggestions” are, the Attorney General cannot comment in detail.

However, if the “suggestions” have been that the proposed amendment will trigger greater federal constitutional rights in the criminal process, those suggestions are false. The federal constitutional rights that a criminal defendant enjoys have never been conditioned on the existence of a particular kind of state post-conviction review. In fact, there is no federal constitutional right to state post-conviction review at all.

If the “suggestions” have been that the proposed amendment will trigger the creation of greater state constitutional rights, the Attorney General is aware of no valid foundation in the state constitution for such action.